92-1994 (3)

Supreme Court, U.S.
FILED
JUN 15 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION,
JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

VOLUME II OF APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, AND DOUGLAS EDDINS,

Defendants.

ORDER

The court heard numerous discovery disputes in this matter on Thursday, July 9, 1992, and Thursday, July 16, 1992. I have considered the evidence and arguments of counsel. I have also carefully reviewed the file in this matter. On the basis of that review, I have heretofore entered certain oral findings and conclusions from the bench. On the basis of those findings and conclusions, it is

ORDERED as follows:

1. The "Motion for Protective Order Requiring Confidentiality Agreement Prior to Inspecting Documents Requested to Be Produced and to Postpone the Scheduled Deposition of Defendant

James Beldin Scheduled for June 23, 1992" filed June 19, 1992, is GRANTED.

2. The "Motion for Protective Order Requiring Confidentiality Agreement Prior to Inspecting Documents Requested to Be Produced and to Postpone the Scheduled Deposition of Defendant Douglas Eddins Scheduled for June 30, 1992" filed June 29, 1992, is GRANTED.

3. Defendants will forthwith produce all documents requested in "Plaintiff's First Request for Production of Documents to Defendants Louisiana-Pacific Corporation and Douglas Eddins," the court having contemporaneously entered an Order Protecting Confidential Information. All documents produced will be subject to the Order Protecting Confidential Information.

4. "Defendants' Motion for Protective Order and for Attorney Fees" filed July 2, 1992 [concerning "Plaintiff's Notice to Take Depositions" filed and served June 30, 1992] is GRANTED.

5. "Plaintiff's Motion for Reconsideration, Motion to Compel and/or for Sanctions, and Certificate of Compliance With Local Rule 403G" filed July 13, 1992, is GRANTED IN PART and DENIED IN PART, as follows:

(a) Insofar as the motion requests that defendant produce all documents covered by the "First Request for Production of Documents to Defendants Louisiana-Pacific Corporation and Douglas Eddins," the motion is GRANTED. These documents will be produced under the protection of the contemporaneously-entered Order Protecting Confidential Information.

(b) Insofar as the motion seeks answers to the "First Interrogatories to Defendants Louisiana-Pacific Corporation and Douglas Eddins," the motion is GRANTED, and the court finds that defendants have already responded to this discovery.

(c) Insofar as the motion requests some form of sanction arising out of the conduct of defense counsel at a deposition which commenced on May 14, 1992, the motion is DENIED for failure to produce the deposition transcript or any other information in support of the motion's allegations.

(d) Insofar as the motion requests any other sanction against defendants or their counsel, the motion is DENIED.

(e) Insofar as the motion requests reconsideration of my rulings on defendants' motions for protective orders, the motion is DENIED.

6. The request for sanctions contained in "Plaintiff's Response to Motion for Approval of Attorneys' Fees with Affidavit and Plaintiff's Request for Sanctions Pursuant to Fed.R.Civ.P. 11" filed July 14, 1992, is DENIED.

7. Until further order of the court, any deposition which plaintiff hereafter schedules in this matter will be taken pursuant to the terms of the Special Order of Reference to United States Magistrate Judge entered contemporaneously with this Order.

8. "Plaintiff's Request for Approval of Discovery Requests Pursuant to the Court's July 9, 1992 Order" filed July 9, 1992, is DENIED.

9. "Defendants' Motion for Approval of Attorneys' Fees With Affidavit" filed July 13, 1992, is GRANTED.

10. Pursuant to rules 26 and 37 of the Federal Rules of Civil Procedure, plaintiff's counsel, David L. Smith, will, on or

before July 27, 1992, pay defendants the sum of $4,541.25 as a reasonably attorney fee in connection with defendants' filing of the motions for protective orders. This sum consists of the $4,060 documented in "Defendants' Motion for Approval of Attorneys' Fees with Affidavit" filed July 13, 1992, plus an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time).

Dated this 16 day of July, 1992.

BY THE COURT:

/s/
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243

GEANA J. DUNKIN,

Plaintiff,

vs.

LOUISIANA PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

ORDER PROTECTING CONFIDENTIAL INFORMATION

The court, being sufficiently advised, hereby makes the following findings, conclusions, and orders concerning confidential and proprietary materials:

1. The purpose of this Order Protecting Confidential Information (the "Order") is to protect against the unnecessary disclosure of confidential information. This Order shall apply to documents, and the information obtained from such documents, which are produced by any part in response to discovery requests propounded by another party. This Order shall be binding until superseded by written agreement of the parties or by order of the court.

2. The term "confidential information" as used in this Order means any document produced by any part in this litigation and any information obtained from such documents, including all extracts or summaries which were prepared, in whole or in part, by use of such documents and which disclose information contained in such documents. The plaintiff has requested extensive and voluminous documents from Defendants Louisiana-Pacific Corporation and Douglas Eddins, including but not limited to, personnel and medical files of current and former employees, personnel policies and procedures, EEO-1 reports and affirmative action plans, and OSHA forms and reports. As most of the requested information is confidential and/or proprietary, and because it would be burdensome and costly to identify each page of each document which would be subject to the protections of this Order, all documents produced by the defendants in response to the "Plaintiff's First Request for Production of Documents to Defendants Louisiana-Pacific Corporation and Douglas Eddins" will be treated as confidential until further order of the court.

3. The term "qualified person" as used in this Order means

(a) counsel of record in this action, employees of such counsel to whom it is necessary that confidential information be disclosed, and expert witnesses;

(b) any party in this action to whom it is necessary that confidential information be disclosed.

4. Except pursuant to paragraph 5, no documents subject to this Order shall be made available to persons other than qualified persons or the party who produced the documents, and shall be used only for purposes of this action.

5. If any confidential document, including the information obtained therefrom, is the subject of deposition testimony, or is marked, attached to, or otherwise incorporated in a deposition transcript, the portion of the transcript relating to the confidential document or information shall be deemed confidential and identified as such by placing thereon the following legend on each page of the transcript: "Confidential." Such portion shall, to the extent possible, begin and end on separate pages of the transcript and shall be filed or lodged, if at all, only under seal. Any deponent who is to be shown, or to be questioned with respect to, confidential documents or information shall, prior to receiving such material or prior to any question with respect to such material, be furnished with a copy of this Order and shall acknowledge on the deposition record that he or she has read and understands the provisions of this Order, agrees to comply therewith, and agrees not to disclose the confidential document or information.

6. If and to the extent that any party believes that any documents have been improperly labeled as "confidential" and wishes to disclose such documents outside the terms of this Order, that party shall provide all other parties with reasonable notice of intent to so disclose the documents. "Reasonable notice," as used in this Order, means five (5) business days. If the parties cannot resolve their disagreement with respect to the disclosure of any documents designated as confidential or the propriety of such designation of any document, the parties shall jointly petition the court for a determination of these issues.

7. Nothing in this Order shall prevent disclosure outside the terms of this Order if the party which produced the document consents in writing to such disclosure, or if the court, after notice to all affected parties, permits such disclosure.

8. All confidential information or documents filed with the court, and any pleadings, motions or other papers filed with the court disclosing any confidential information or documents, shall be filed or lodged under seal. Only confidential portions of filings with the court need be filed under seal.

9. Nothing contained in this order [sic] shall affect the rights of any party with respect to any document other than a confidential document obtained through discovery herein, or any

information developed from a source other than a confidential document obtained through discovery herein. Such information or documents may be used without regard to this Order, even if similar or identical information or documents have been designated as confidential hereunder.

Dated this 16th day of July, 1992.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

SPECIAL ORDER OF REFERENCE TO UNITED STATES MAGISTRATE JUDGE

On July 9, 1992 and July 16, 1992, I held hearings on discovery disputes in this matter. One of these disputes centered on deposition discovery sought by plaintiff. Based on the conduct and demeanor of plaintiff's counsel during the scheduling of these depositions and during court hearings in the case, I have found that counsel's conduct is an harassing abuse of the deposition process. I am also concerned about the sheer number of depositions proposed: this is a rather straightforward case involving allegations of retaliatory conduct and discrimination based on age and sex, and a proposal to take over 40

depositions would at least appear, at first blush, to raise questions concerning the necessity of such depositions in a case of this nature. (By express this "concern," I am making no findings on this question; the magistrate remains free to reach his own conclusions and findings, pursuant to this order.) It is therefore

ORDERED as follows:

1. Pursuant to rule 602 of the United States District Court for the District of Colorado Local Rules of Practice, this matter is referred to United States Magistrate Judge Richard M. Borchers for the purpose of conducting an initial settlement conference and scheduling such further settlement conferences as the magistrate shall deem appropriate. This order is to be construed as a delegation of the court's authority, under Fed. R. Civ. P. 16(c)(7), to direct attorneys and unrepresented parties to appear before it for a pretrial conference to consider "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." Failure to obey the magistrate's orders entered under the authority of this order, to appear at the conference, or to participate in good faith in the settlement conference may result in the imposition of sanctions under rule 16(f) of the Federal Rules of Civil Procedure.

2. Pursuant to 28 U.S.C. § 636(b)(1)(A) (1989) and rule 602 of the United States District Court for the District of Colorado Local Rules of Practice, the matter is also referred to United States Magistrate Judge Richard M. Borchers for the purpose of regulating, overseeing, scheduling, and supervising depositions taken by plaintiff's counsel in this case, in accordance with the following guidelines:

a. Plaintiff's counsel will take no depositions in this case, until further order of the undersigned judge, unless and until he complies with these guidelines

b. Plaintiff's counsel will submit to the magistrate (and serve on opposing counsel) a deposition plan. The deposition will contain the following information:

i. The name of each proposed deponent.

ii. A statement concerning the information which counsel proposes to elicit from each deponent and the manner in which this information is relevant to the subject matter of this litigation or is calculated to lead to admissible evidence. The statement shall be in detail sufficient to allow the magistrate to determine whether a given deposition should be taken at all, whether a given deposition should be postponed until other depositions

are completed, and whether a given deposition would likely be cumulative.

iii. An estimate of the time required for each deposition.

c. The magistrate will review the deposition plan, hold any hearings or conferences which he deems advisable, and enter any orders he deems necessary to allow adequate trial preparation, avoid undue expense and burden, prevent cumulative discovery, and preclude harassing conduct. This authority includes, without limitation, the authority to order that a given deposition not be taken at all, to order that groups of depositions be taken in stages, to set time limits on depositions, and to order that depositions be taken in a certain sequence. In his initial orders entered after reviewing the deposition plan, the magistrate may also set times and dates for any or all depositions.

d. Unless the magistrate sets times and dates for a deposition in his initial orders, plaintiff's counsel shall not schedule or notice that deposition until the magistrate, on counsel's request or motion, approves the proposed time and date. The motion or request shall recite: 1) the efforts which

plaintiff's counsel has made to contact opposing counsel and agree upon the proposed time and date; 2) whether opposing counsel has agreed to the time and date; 3) any other information which the magistrate may require.

e. Unless otherwise ordered by the magistrate, for good cause shown, all depositions taken by plaintiff's counsel shall be taken at the United States Courthouse in Denver, Colorado at a time and date when the magistrate will be available to resolve issues which may arise during the course of the deposition and to accomplish the purposes specified in paragraph 2.c. of this order of reference.

f. Upon a proper showing by plaintiff's counsel that any submission or statement required of him under this order of reference would require him to reveal matters of litigation strategy or tactics or that such submission or statement should not be served on opposing counsel, the magistrate may, upon notice to opposing counsel and opportunity to object, allow the submission or statement to be made ex parte.

g. Nothing in this order of reference precludes plaintiff's counsel from taking depositions of persons not identified in the initial deposition plan, provided that he supplies

the magistrate with the information required in the initial deposition plan, obtains an order from the magistrate permitting the deposition, and otherwise complies with the guidelines set forth in this order.

h. The magistrate may from time to time recommend to this court that plaintiff's counsel be relieved from one or all of the guidelines contained in this order of reference.

Dated this 16th day of July, 1992.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	92 N 243
	)	
LOUISIANA-PACIFIC CORPORATION,	)	
	)	
Defendant.	)	

HEARING - DISCOVERY DISPUTES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 6:00 a.m. on the 3rd day of December, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, # 300
Denver, Colorado 80202

For the Defendant:

Cecil Raymond Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

PROCEEDINGS

(At 6:00 a.m. on December 3, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge, with Mr. David Smith appearing as counsel for the plaintiff and Mr. Cecil Hedger appearing as counsel for the defendant, the following proceedings were had:)

THE COURT: Case 92 N 243, Geana Dunkin versus Louisiana-Pacific Corporation. Mr. Smith appears for the plaintiff, Ms. Dunkin, and Mr. Hedger appears for Louisiana-Pacific Corporation.

The matter is before the Court this morning on numerous motions. Perhaps the earliest motion that needs to be taken up is the plaintiff's motion for reconsideration filed November 9th, 1992, which requests reconsideration of a ruling by Magistrate Judge Pringle during the course of a deposition on October 29, 1992.

I've reviewed the motion and I've also reviewed the response which was filed on November 30th. At this time, I will permit the parties to supplement either of their submissions. I have read both submissions carefully and am prepared to rule, but I'll allow you to say

anything that you wish to say. Mr. Smith? By way of supplementation, of course.

MR. SMITH: Yes, Your Honor, David Smith on behalf of the plaintiff. The transcript has now been provided to the Court and the only additional thing that I would say by way of supplementation is that apparently the defendant's argument revolves around this previous ruling by the Court going to the detailed documentation relating to the discrimination issue against the Stacker Building employees. And I would merely--

THE COURT: This is the Stacker in Walden; right?

MR. SMITH: Yes, Your Honor.

THE COURT: And you are alleging that there was discrimination against the Stacker employees in Walden?

MR. SMITH: Yes, Your Honor, and that there were statements made by high level officials relating to that incident showing discriminatory intent that would be relevant to this case. And as I understand the defendant's argument, it is that since this Court previously ruled in connection with certain documents that the plaintiff asked to be turned over, certain detailed documentation relating to the pay and benefits of these Stacker Building employees, since the plaintiff admitted at a previous hearing on a motion to compel with respect to

that documentation that that documentation is only marginally relevant to this discrimination issue, that that means that the whole issue cannot be gone into at all in this case. And that is not what my understanding of this Court's ruling was.

My understanding of this Court's ruling was that the documentation would not have to be turned over, because that kind of detailed documentation is only marginally relevant. But there was no ruling made that the plaintiff could not go into the issue of discrimination.

In fact, this Court has previously ruled, it is my understanding, that pattern and practice type discrimination is in fact relevant in this case, and the Stacker Building employee incident would certainly fit into the category of pattern or practice type discrimination that we would be going into.

THE COURT: Well, you're arguing something a little different than what the magistrate judge ruled. Magistrate Judge Pringle did not permit you to go into pay or benefits concerning Stacker employees. He did not prevent you from asking questions about conversations that Ms. Dunkin may have had with Mr. Eddins in which Mr. Eddins referred to those employees as Mexicans or whatever he referred to them as.

MR. SMITH: Well, Judge, the initial question in this line of questioning dealt with pay or compensation of the Stacker Building employees. At that point, Mr. Hedger insisted on making his objection and refusing to allow the witness to answer any questions, at which point the magistrate was called in.

I tried to explain to the magistrate what this situation was all about. At that point, I told him that this was going into an area of discrimination that I felt was relevant to the issues in this case.

Now, I would admit that his specific little ruling related to the one question that was the initial question in this line of questioning, but the magistrate would not permit really any discussion beyond that one little question, even though I was telling him that this was an initial question in a line of questioning, and then the magistrate said, "Well, you can make your record on whatever you want to make it on," and so I did make a record showing how that this information, if we had been allowed to go into it, would have related to discrimination and should have been allowed. But it was my understanding that he was saying you cannot go into that whole line of questioning relating to pay and compensation of these Stacker Building employees.

THE COURT: Well, Mr. Smith, as has happened previously in this occasion, I simply think you do not listen to judges' rulings. I am

going to read to you from Page 99 of the transcript. This is Magistrate Judge Pringle, and I quote, "Any questions--Line 13--any questions that relate to pay or benefits concerning Stacker employees of the Walden, Colorado plant need not be answered, and the Court directs that the deponent does not have to answer those questions."

MR. SMITH: All of the questions that I had to ask relate to the pay or benefits of those workers.

THE COURT: Well, now that's not what you just argued a moment ago to me. I understood that you were going to offer proof that in the context of a discussion concerning the pay or benefits of the Stacker employees, which discussion was between Mr. Eddins and Ms. Dunkin, Mr. Eddins made some remark about how most of those employees were Mexican and wouldn't understand something anyway.

MR. SMITH: Actually--

THE COURT: --and that, of course, I would say would be some evidence on Mr. Eddins' part of, at least arguable evidence, I'll say, of a bias toward Hispanics, and if you wanted to take the additional jump, or if you wanted to ask the fact finder to take an additional jump, it could be some arguable evidence of general discrimination, or discriminatory intent, even though Ms. Dunkin is not Hispanic and is not bringing a suit based on national origin discrimination.

That's what I thought--the argument I think is attenuated in any case, but I can see how you could ask a fact finder to find that a person who has this intent toward Hispanics is more likely to have a discriminatory intent or animus toward other minority groups, including women. I can see how you might wish to make that argument and how this evidence might tend to prove that argument. That is not what you were asking and that is not what magistrate judge prevented you from asking. All I can do is read what the magistrate judge ruled.

MR. SMITH: Your Honor, I believe that you said it just a moment ago; this was all in the context of asking about pay and compensation for these Stacker Building employees. That was the initial question in this line of questioning.

THE COURT: What you were--

MR. SMITH: And Mr. Hedger's objection to this was we cannot go into this whole line of questioning because the judge has already ruled that the documents relating to pay and benefits of these Stacker Building employees is not to be turned over and, therefore, this whole issue cannot be addressed.

THE COURT: Well, Mr. Smith, there is a distinction between getting into the issue of--the collateral issue of what benefits were paid to Stacker employees at Walden and the question of what statements Mr.

Eddins may have made to Ms. Dunkin in the course of dealing with those benefits.

MR. SMITH: Well, those--let me correct one thing. This does not relate in the first place to a statement made by Mr. Eddins. This relates to a statement made by a higher official at Louisiana-Pacific Corporation by the name of Dick Rydeen. And after what I interpret to be a discriminatory statement was made by this Dick Rydeen, Ms. Dunkin went to Mr. Eddins to speak with him about this statement that had been made.

THE COURT: Well, was Rydeen Eddins' supervisor, or was Eddins Rydeen's--

MR. SMITH: Mr. Rydeen, as I understand it, was Mr. Beldin's supervisor, and there has been testimony and interrogatories answered in this case indicating that Mr. Beldin was the sole decision maker for the decision to cut off my client's disability benefits in this case.

THE COURT: All right, wait a minute. Now, did you say Beldin was Rydeen's supervisor, or Rydeen was Beldin's?

MR. SMITH: Rydeen was Beldin's supervisor. But I just wanted to make that factual correction, that it was Mr. Rydeen who made the statement and not Mr. Eddins who made the statement. It was

Ms. Dunkin's conversation with Mr. Eddins about Mr. Rydeen's statement, is the way this came up. And the only point that I would make further is that, Judge, it seems to me that I'm having a whole line of questioning that has been cut off in this way.

To be honest with you, I don't think that the magistrate understood what was going on, and Mr. Hedger used this situation to just cut off a whole line of questioning; it's improper. I can't conduct depositions this way. You ask one question, an objection is made, a refusal to answer, the magistrate comes in and just cuts off a whole line of questioning; I can't do any--I can't deal with that. That simply is too arbitrary to be reasonable, and I think it was totally improper that the magistrate cut this off.

THE COURT: All right, I'm prepared to rule. This matter was referred to the magistrates, particularly Magistrate Borchers, under my special order of reference of July 16th, 1992 for the purpose of overseeing depositions to be taken by the plaintiff in this case.

Magistrate Pringle, as I understand it, was acting in the absence of Magistrate Borchers and was asked to rule on certain objections that were made during the course of the proceeding involving Mr. Eddins' deposition.

I believe--well, first of all, the statutory standard for my determination of this issue as a district judge reviewing the magistrate's orders is clear, and I can reconsider the order under Section 636 of Title 28 only if the order is clearly erroneous or contrary to law.

I read a moment ago the essence of Judge Pringle's ruling, and the essence of it was that questions relating to pay or benefits concerning Stacker employees of the Walden plant need not be answered. Part of the basis for that ruling was a representation that was earlier made by plaintiff's attorney in this court in the context of another discovery dispute that, in plaintiff's attorney's words, the documents concerning those pay or benefits, the detailed documents, would be "marginally relevant."

I don't see any difference between documents relating to the pay or benefits and questions that are designed to ask or inquire into the very areas covered by the documents.

Magistrate Judge Pringle, contrary to plaintiff's view of this matter, did not rule that Mr. Smith, plaintiff's attorney, was prevented from asking any questions concerning Ms. Dunkin's conversations with Mr. Eddins or concerning statements made by the other gentleman who is Mr. Beldin's supervisor, Rydeen. Any statements made by those people in the context of resolving benefits

concerning Stacker employees could be answered. If Eddins had heard a conversation in which Mr. Rydeen had indicated, for example, that the Stacker employees were mostly Mexican and, therefore, were dumb or didn't understand things, I would think that the plaintiff would be entitled to inquire into that area.

There is a great distinction, however, a great gulf between that sort of limited questioning which would be designed to discover information relevant to this case or information which might lead to other relevant information, and detailed inquiry into the benefits concerning the Stacker employees, which I don't think has anything to do with this case. And in any event, Magistrate Pringle concluded it didn't have anything to do with this case. I think he's not only not clearly erroneous, but he's right, and plaintiff's attorney conceded that he was right as to the details of the discussion with Stacker employees.

For those reasons, I find that the magistrate's ruling contained on Page 99 of the transcript, which is Exhibit D to Mr. Hedger's response in this case, is correct. It is not clearly erroneous, and that ruling of Magistrate Judge Pringle is not reconsidered. Plaintiff's motion is denied.

Now, I hope that's clear enough. I take it there's going to be a continuation of Mr. Eddins' deposition. Is that right, Mr. Hedger, or is that done?

MR. HEDGER: Not to my knowledge, Your Honor. I think we've concluded--I understood plaintiff's counsel to have concluded his deposition.

THE COURT: Well, is Mr. Eddins alleged to have heard a statement made by Mr. Rydeen? Who made the statement supposedly that the Walden Stacker employees were Mexican and, therefore, dumb? Who made that statement?

MR. SMITH: Mr. Rydeen.

THE COURT: To whom?

MR. SMITH: The statement was made to Ms. Dunkin, and then subsequently Ms. Dunkin had a discussion about that with Mr. Beldin and another person by the name of Robert Teal, who was the plant manager at Walden, and then Ms. Dunkin went to the State Department of Labor and got an opinion and then discussed all of this with Mr. Eddins, and that's the reason for the inquiry of Mr. Eddins. Mr. Eddins apparently told Ms. Dunkin to go back to Mr. Teal to get the situation straightened out, and then there were further discussions after that. But the part I was asking Mr. Eddins about was Ms.

Dunkin's conversations with Mr. Eddins about the previous conversation.

THE COURT: Well, Mr. Hedger, I think that particular part of the conversation is proper. I don't think Judge Pringle precluded him from getting into that conversation. However, it concerns me a little bit that the question that Mr. Smith asked is revealed at Page 90, Exhibit E to your motion, related to conversations that Mr. Eddins had with Joy Dunkin. Mr. Smith phrased the question inartfully because he said conversations with Joy Dunkin regarding the type of pay and benefits the Stacker employees at the Walden plant received. One could interpret that as a detailed inquiry into the pay and benefits at the Walden plant, which I believe is irrelevant and which plaintiff's counsel has concluded is irrelevant.

It could also be construed as a way of introducing the topic of a conversation that he had regarding issues arising out of the Stacker employees' plan at Walden, and then he could follow up with questions saying do you remember that you told Mr. Eddins what Mr. Rydeen had said about the Hispanics at the plant. That certainly wouldn't be admissible evidence, but it might lead to admissible evidence, depending on what the answer is. Am I clear on that, Mr. Hedger? You're looking a little puzzled.

MR. HEDGER: Well, may I be heard for a moment, Your Honor?

THE COURT: Yes.

MR. HEDGER: First, this lawsuit does not involve, nor in my wildest imagination would there ever be enough evidence to even justify this lawsuit being surrounded by some sort of pattern and practice type of discrimination.

During the discovery in this matter, there has been evidence of approximately five--from 1984 to the present, five charges of alleged discrimination. One charge was dismissed and nothing else happened. One charge did result in a lawsuit that Mr. Smith was plaintiff's counsel for. That lawsuit was settled before any ultimate determination was made concerning that litigation. There was never ever any charge of alleged discrimination concerning anything having to do with the Stacker employees at the Walden facility.

Moreover, this lawsuit does not involve national origin discrimination. This involves age, sex and handicap discrimination.

We dispute the statement of Mr. Rydeen as, right now, on the basis of the representation of Ms. Dunkin; we dispute that that happened. I'm not going to represent to the Court that it did or did not at this point in time, but my argument, Your Honor, is that in 1987 or

1988, concerning contract employees then employed at Walden with respect to their pay and benefits, if a statement was made to that effect, it was innocuous at best, but in any event, is totally and wholly irrelevant to the issues presented in this lawsuit.

THE COURT: Well, Mr. Hedger, I think marginally relevant might be the more correct term. As I said earlier, it seems to me that plaintiff's counsel should--could at least argue to the fact finder that somebody connected with this decision at Louisiana-Pacific had a general discriminatory animus.

Now, that of course is national origin discrimination, as you point out, and as I pointed out earlier. Ms. Dunkin's case is an age and sex discrimination case.

What I'm suggesting is that Mr. Smith may b able to argue that there is a discriminatory animus in general, or a discriminatory animus that was involved in making the decision in Ms. Dunkin's case. I would think national origin discriminatory animus would at least be something that he would want to argue to the trier of fact, makes it more likely than not that there was also a discriminatory animus with respect to Ms. Dunkin's sex discrimination charge.

Certainly statements such as that attributed to Mr. Rydeen would be some evidence of a discriminatory animus. The

representation that's been made is that with respect to the Stacker employees, he noted that they were Mexican and, therefore, stupid, which if true would be some evidence of discriminatory animus.

It's a bit difficult to me to see exactly where Ms. Dunkin's conversation with Mr. Eddins leads. Suppose that Mr. Eddins testifies yes, Ms. Dunkin told me that Mr. Rydeen had made those statements to her, that doesn't prove anything because somebody who heard the statements of Mr. Rydeen has to be testifying when the case eventually goes to trial, and that's going to be Ms. Dunkin. Ms. Dunkin says the statements were made to her by Mr. Rydeen, and so it's a little difficult for me to see what Mr. Smith is trying to do when he uses or tries to get Mr. Eddins to admit that Ms. Dunkin told him that she had heard Mr. Rydeen make these statements.

I suppose conceivably it could be a prior consistent statement introduced to rebut an implied charge of falsification, should the defendant adopt that strategy at trial. In other words, if the defendant takes the position that Ms. Dunkin is lying when she talks about Mr. Rydeen's statement, then Mr. Smith may want to introduce Mr. Eddins' testimony as a prior consistent statement of Ms. Dunkin.

That's attenuated, there is no question about it, but under the standard of Rule 26, I think he would be entitled to inquire

into that limited area. And it seems to me that by inadvertence, you may have cut him off from that area. I don't think the magistrate did it. The magistrate was pretty clear in what he ruled, and I quoted that earlier.

Is Mr. Eddins ever back in Denver as a matter of traveling in his regular business?

MR. HEDGER: Your Honor, he is now assigned in Nevada with respect to putting on line a new manufacturing facility. I will represent to the Court that I will talk with Mr. Eddins and inquire about his recollection of any conversations with respect to this issue.

THE COURT: Well, with all due respect, that doesn't solve the problem.

MR. HEDGER: Yeah, I understand.

THE COURT: You're not the one who's entitled to inquire. Mr. Smith is entitled to inquire.

All right, to resolve this issue, even though I've affirmed the magistrate's order and refused to reconsider it, I'm going to have Louisiana-Pacific at some time convenient to it bring Mr. Eddins back to Denver for a deposition which will not exceed one-half hour in length, because it seems to me that in a half hour, Mr. Smith can easily inquire into the limited area that I'm going to permit. He's

not going to be permitted to inquire into the details of the Stacker employees' compensation at Walden.

MR. HEDGER: Your Honor, may I suggest the possibility of a telephone deposition in light of the fact that Mr. Eddins--that plaintiff's counsel has had a chance to eyeball Mr. Eddins in terms of his personal appearance here earlier?

THE COURT: I think that's a good suggestion. Mr. Smith, do you want to make any objection to that, or wold that be acceptable to you?

MR. SMITH: I assume that--how would that be arranged? I assume that we can work that out.

THE COURT: Well, telephone depositions are done all the time. The reporter is usually present at the other end of the telephone with the deponent, a I have done it in the past, so that she swears the deponent, and then you conduct the deposition.

MR. SMITH: Will Mr. Hedger then arrange that on the other end?

THE COURT: Well, ordinarily I don't have to get into this refereeing of these kinds of details. It's your deposition, you're entitled to notice it, and I think you are obligated to arrange it if it's to be a telephone deposition. And Mr. Hedger certainly needs to cooperate

with you by telling you where Mr. Eddins can be reached, what the nearest town in Nevada is with a notary public or a court reporter. There's got to be cooperation, but it is primarily your burden because it is your deposition.

Hearing no objection, I am going to order that the deposition of Douglas Eddins be continued by telephone with Mr. Eddins available, I presume, in Nevada and under oath in Nevada and Mr. Smith will not be required to travel, so you'll be able to do it in Denver, Mr. Smith, and Mr. Hedger, you can be wherever you want to. And the basis for that order, frankly, is that, Mr. Smith, I don't think you posed a very clear question or pursued the precise question on the record of conversations in which Ms. Dunkin related to Mr. Eddins her prior conversation with Mr. Rydeen. It's not clear to Mr. Hedger and it's not clear to the magistrate that that's what you wanted to do. What it appears that you wanted to do is get into the detail of the Stacker employees, and that's not going to be permitted.

For those reasons, it seems to me that there was no real interference with your asking the question at the original deposition and, therefore, it's fair and appropriate that your continuation of the deposition should be by telephone so that there's no additional expense

to the defendant in the case in bringing Mr. Eddins back for this limited purpose.

The next matter is plaintiff's motion for reconsideration filed December 2nd regarding Magistrate Judge Borchers' written order relating to the so-called request that Ms. Dunkin made for depositions, the magistrate's order having been filed November 24th, 1992.

Mr. Hedger, you haven't had an opportunity to respond, so I will give you an opportunity to respond. I have to say I'm fully informed. I don't have--I believe I'm fully informed. I have seen what Mr. Smith submitted to the magistrate. I did not read it; I measured it. It was approximately two and a half inches thick, for the record.

MR. HEDGER: Your Honor, just briefly, the motion for reconsideration I received yesterday afternoon on my way out of the office continues to miss the point, with all due respect.

On July the 16th, going back in fact to July the 9th, this Court, on the record, indicated that the plaintiff's counsel was required to detail the information from a prospective deponent in terms of why a deposition was necessary. That is, the plaintiff's counsel was expected, as this Court pointed out on November 4th in its miscellaneous order Number 1, that a reasonable trial lawyer would talk to a witness before they willy-nilly go out and about and try and get a deposition taken.

That is all that Judge Borchers has required in this matter, in conformance with your special order of reference to the magistrate of July the 16th, and all that Judge Borchers has required of plaintiff is a document of any kind indicating that Mr. Smith, a legal assistant employed by Mr. Smith or an investigator employed by Mr. Smith has talked to one of these prospective deponents and has got the following information. And when Judge--Magistrate Judge Borchers indicated any document will do, he made reference to the fact of a telephone message to Mr. Smith or his employees from one of these deponents indicating what Mr. Smith expected them to do.

As Magistrate Borchers observed in his most recent order, the 3,000 or so pages of documents that Mr. Smith filed have nothing whatsoever to do with any information supplied to Mr. Smith or any of his employees concerning what any of these prospective deponents would be expected to testify to and/or why the evidence can't be obtained in any other manner.

Moreover, Your Honor, I'm very, very disturbed by a representation by Mr. Smith on Page 3 of his motion for reconsideration that somehow or another on Monday of this week--excuse me--on Tuesday of this week, on December the 1st, this Court "notified the parties and their attorneys that no extension of the December 18, 1992

discovery cutoff will be granted," and that's after Mr. Smith specifically informed the Court he wished--did not wish it to be extended, and when Mr. Smith admitted in this court that this entire exercise was something that he did not need for trial.

I am-well, I'm sure the Court's aware of this Court's order of--miscellaneous order Number 1 dated on or about November 4, 1992, in which this Court again articulated in writing very, very clearly the deficiencies in the prior deposition plan that plaintiff's counsel had submitted to the magistrate and this Court's denial of that motion for reconsideration of the magistrate's determination.

Again, Your Honor, this instant motion for reconsideration misses entirely the point and picks and chooses appropriate language out of context with respect to prior court orders and does not focus on what this Court expected any "reasonable trial lawyer" to do before throwing forward a deposition plan, particularly, Your Honor, in this instance where plaintiff's counsel, with no information whatsoever, no discovery to date ever asked of us, to expect defendants to sit by willy-nilly and allow their chief executive officer of a major corporation be deposed on something that he has absolutely no personal knowledge. Would request that the Court deny this motion.

THE COURT: All right. I certainly agree with your characterization of what I ordered concerning discovery. I did not indicate that under no circumstances in the world would I extend the discovery deadline, in light of the problems in this case.

What I did do at the hearing earlier this week is to say that the case would be put on a calendar call and set for trial in light of the fact that Mr. Smith represented that a lot of his stuff wasn't necessary for trial.

So I think it's a mischaracterization, undertaken with what motive I do not know, to say that I cut off discovery on December 18th and am, therefore, being unreasonable.

Mr. Smith, I've reviewed your motion. Do you wish to supplement the motion?

MR. SMITH: Yes, I do, Your Honor.

I, first of all, would like to address that issue of the discovery cutoff date, not so much in terms of whether the Court would or would not grant an extension of the discovery cutoff date, but in terms of where the magistrate judge's order leaves me with respect to discovery, since this Court has ordered that there is a discovery cutoff date of December 18th.

Under this latest order, this November 23rd order by Magistrate Judge Borchers, the procedure that he has set up for him to make a final determination as to whether he is going to authorize the plaintiff's depositions in this case is set up in such a way that he is not even going to make a ruling on that point until after 3:30 p.m. on December the 9th.

Now, Your Honor, I have asked that 19 depositions be taken or completed in this case. We began discovery in this case last April, and now what I find out is because of the magistrate judge's scheduling in this case, that what I get is nine days to schedule these depositions, to subpoena the parties and to take their depositions. That simply is not reasonable. I can't do that, Judge. I cannot do all of that, especially with the additional requirements that this Court has placed on me with respect to scheduling these depositions. There is simply no way that I can do 19 depositions in nine days.

And in my opinion, and I am attributing motivation here, but in my opinion, the magistrate judge is doing this on purpose to squeeze the plaintiff. It is simply an abuse of power, and that is what is being done here. There is simply no reason in the world why the plaintiff has to get all of his discovery--her discovery in the nine final days of a discovery cutoff period. It is not fair; it is not reasonable.

These people, most of them are located 120 miles away from Kremling, Colorado. We have no chance to get this discovery done during that time.

Mow the comments about me saying that I did not need this discovery for purposes of trial still hold. In my opinion, all of this discovery that's being done in this case, at least with respect to the depositions, has no purpose except to defend the summary judgment motion. I was not clear the last time we were in here whether you were saying that you were not going to grant a summary judgment motion if the defendants filed it, or whether you were saying that you just were going to limit the discovery cutoff period and not allow any further discovery.

If the Court wishes to state that we--that a summary judgment motion will not be granted even if filed, I'll be happy to waive the depositions. But I need the depositions if a summary judgment motion is going to be filed and heard. And I thought that what the Court was indicating was that we were going to just go directly to trial and not have to go through that whole burdensome procedure of the summary judgment. I'll be happy to waive the depositions if we're not going to do that.

THE COURT: Well, we may be able to work something out here. I see this is about a two or three day trial.

MR. SMITH: Well, perhaps five.

THE COURT: Perhaps three. And perhaps Mr. Hedger might confer with his client and agree with you, and if you two stipulate that neither party will file a motion for summary judgment, we'll take this case to a trial and that will be the result, that may be a way of resolving all of this. The alternative is--

MR. SMITH: I think that would be wonderful, and I think my client would go for that, not having to spend all of this money to take all of these depositions would be fine.

THE COURT: Well, I'll tell you what. You all negotiate that, because I can't force Mr. Hedger or Louisiana-Pacific to forego the right to file a summary judgment motion and avoid trial if they think they have a good motion. And your statement is completely illogical because to say--

MR. SMITH: Well, I don't want to cut off--

THE COURT: To say that this is not necessary for trial, but to rebut a summary judgment motion which wold involve the same issues as would be presented at trial, is simply bizarre. I've never heard that one.

MR. SMITH: Well, Judge, it is not bizarre. Under the summary judgment rules, we're required now to have a paper trial before the trial, and if opposing counsel doesn't want that, well, that's just ducky dandy with the plaintiffs. We wold love not to have a paper trial before the trial.

THE COURT: Well, that can be taken up at a future date. Mr. Hedger, will you consult with your client and see if there's a way to do that? I strikes me that from Louisiana-Pacific's viewpoint, it wold be less expensive to defend a three day trial in this case than it would be to come in here and fight over these depositions on this continuing basis and then pay for your time in setting through all of these depositions.

I'm assuming some depositions are going to be taken. I don't know whether all 19 are going to be taken, but some depositions are going to be taken in the case. It's a matter of when Mr. Smith finally submits something that the magistrate thinks complies and that I think complies with the Court's previous orders.

MR. HEDGER: I most certainly will consult with my client.

THE COURT: All right. I'm not going to take that up any further. Do you have anything further on the motion for reconsideration, Mr. Smith?

MR. SMITH: Yes, Your Honor. And in that light, I have to proceed forward at this point as if the discovery is going to be completed. And I have been attempting to comply with what the magistrate judge has been requiring of me for some period of time now. His latest order on these depositions was November 6th that I have quoted at Page 2, and this was his order, "It is further ordered that plaintiff shall be accorded up to and including November 16, 1992 to submit any documents or other evidence for consideration by the Court for the need for additional depositions."

And after making that order, he nevertheless comes to the conclusion that I have not followed that order. I have no idea what he is talking about. My submission complies fully with that order, and for him to indicate that it does not is--I simply don't understand what he is saying. He originally was requiring that we go out and get affidavits.

THE COURT: All right. I've heard enough. I know the history, Mr. Smith. Sit down. I'm ready to rule.

MR. SMITH: Well--

THE COURT: The motion for reconsideration is denied. Mr. Smith, your position reminds me of Abraham Lincoln's story concerning the little boy who killed both of his parents and then

complained to the court that the court should show him mercy because he was an orphan.

I entered an order in this case on July 16th, 1992 which, as I look back on it, is crystal clear as to what you must do in order to get your depositions taken in this case.

You have submitted deposition plan after deposition plan after deposition plan. As I count them, there are at least three such plans on file now. The first two were the subject of previous orders of this Court, particularly what I've labeled miscellaneous order Number 1. And in that order, I found that you hadn't even come close to complying with what I required in the original July 16th order. Now, miscellaneous order Number 1 was issued, as I recall--

MR. HEDGER: November the 4th, Your Honor.

THE COURT: I was going to say earlier this month. November 4th, 1992. And in the meantime, I extended the discovery cutoff once; the original discovery cutoff was in September. I extended it to December. And still you did not comply.

Finally, on November 16th, you submit to the magistrate an amended deposition plan, and attached to that, as I said, two and one-half inches worth of documents.

The magistrate has responded to that plan by saying I don't quite understand what a driver's license of a third person has to do with these depositions, and he said, in effect, Mr. Smith, you explain that to me. You explain that to me by November 4th, tell me what documents I'm supposed to read.

This is analogous to the defense tactic that is sometimes undertaken in discovery of--which is called box car discovery. You respond to somebody's discovery request by simply pulling up a railroad car full of documents and telling them that the answer to their discovery request is in that railroad car full of documents.

Well, you have, in effect, done that to the magistrate. You've said to the magistrate here are 3,000 pages worth of documents. You read them and figure out why I should be entitled to take these depositions. The magistrate's response is reasonable. He has said you go through the documents and tell me what a driver's license on this page has to do with why I should allow these depositions. He has also scheduled a further hearing on December 9th.

Now, I am a little concerned that the magistrate doesn't act quickly on these matters. And when I say he doesn't act quickly, I mean he doesn't act as quickly as I wold. I wold schedule these things for the following Thursday and they would be done within a week. Not

everybody likes to meet at 6:00 Thursday, and I don't think there's any requirement that *I* impose that on the magistrate, and I don't think that there's any requirement that I manage the magistrate's docket so that he gives this case immediate priority.

You filed the motion on November 16th. The magistrate judge did review what you had submitted. It's evident by his order that he reviewed it, went through it in at least a general way, and filed his order on November 24th. He set a hearing for November 9th. Given the magistrate judge's workload, all of that is reasonable.

So the predicament that you find yourself in is, as Abraham Lincoln's little boy who had murdered both his parents, it's really of your own making, Mr. Smith. You've had four months to submit a deposition plan that complies with my July 16th order. You haven't done it yet, and now you're complaining that the magistrate judge is giving you ten days to do the depositions.

I want to emphasize that that really is a deadline of your own creation. Your remedy, rather than fighting and quibbling and nit picking the magistrate judge, is to see if you can get a discovery extension from this Court. At some point, I'm going to run out of patience with your obduracy, because four months ought to be enough for somebody to submit a deposition plan. I don't think it takes a

rocket scientist to read the order that I entered on July 16th and come up with a deposition plan that complies with it. But you certainly have not done it.

So if you have a complaint with what the magistrate is doing in that it squeezes you, your answer, or the response, is for you to try to get the discovery deadline extended, and I'll consider extending the deadline when that motion is made.

Your motion for reconsideration is denied. At best, it's premature. The magistrate hasn't ruled that you can't take depositions. He scheduled a further hearing, and he's told you to go through the 3,000 pages and tell him how all of that's relevant. That clearly is not an abuse of discretion. It clearly is something that I would have considered had the case been before me. It is not clearly erroneous or contrary to law. It is in conformance with the special order of reference that I entered earlier and it's in conformance with law. It is well within his discretion in supervising discovery. That motion for reconsideration is denied, the one filed on December 2nd.

Before I go any further, I want to return to the previous motion for reconsideration. In the response that Mr. Hedger filed, there was a request, in effect, for sanctions concerning that motion for reconsideration, sanctions in the form of costs, including transcript

preparation, photocopying and attorneys fees in preparing and filing the *response*.

Rule 602 of the local rules in effect prior to June 1st, which govern in this case because the case was filed before June 1st, 1992, Rule 602(c) provides that parties seeking or responding to a reconsideration of a magistrate's order should expect that attorneys fees will be awarded to the prevailing party on such review.

In compliance with that rule and because I think that the motion to reconsider Judge Pringle's order was essentially frivolous, I am going to award reasonable attorneys fees, I am going to award costs, and I am going to award costs including transcript preparation. And I'll say a word about that.

Ordinarily it's the obligation of a party seeking review in a higher tribunal to order a record when asserting that a lower tribunal has committed some sort of error or abuse of discretion. Mr. Smith didn't do that in this case. Rather, Mr. Hedger was put in the position of having to order the transcript to Magistrate Judge Pringle's ruling. The transcript proved to be important because I quoted specifically from it in my ruling denying the motion for reconsideration, because Judge Pringle's ruling was specific and clear. The transcript was necessary for this motion for reconsideration to be determined, and

it's appropriate that the costs of that transcript be taxed to the losing party on the motion for reconsideration.

For those reasons, costs, including costs of transcript preparation and photocopying, and attorneys fees in connection with filing the response to the motion for reconsideration are granted.

I note further that I invited Mr. Smith to withdraw his motion for reconsideration, anticipating that this might arise, that there might be a request for costs or transcripts. Mr. Smith has proceeded full well knowing what the risks were.

MR. SMITH: Your Honor, since I have not had an opportunity to address that aspect, may I make a record on that part?

THE COURT: All right.

MR. SMITH: Your Honor, I think that this issue of attorneys fees under Rule 602(c) has to be addressed in the context of the Tenth Circuit's requirements for making an appellate record. The litigants are in a bit of a bind here. Under the Tenth Circuit's ruling, and I'm sorry I do not have the citation with me. but I didn't now that this issue was going to come up--

THE COURT: Well, Mr. Hedger filed his response requesting this on November 30th, so you had as much notice of his filing as he did of your filing on December 2nd.

MR. SMITH: Well, I don't believe that 602(c) has been mentioned. And what I'm saying is that the principle that is involved here is that if a decision of a magistrate is not appealed to the judge, then one loses one's appellate rights on that issue.

THE COURT: To the circuit court, you mean?

MR. SMITH: No, if a motion for reconsideration is not made from the magistrate to the district judge, the Tenth Circuit has held that the appellate point to the circuit could is lost. So the litigants are put in a position, if you believe that you have a valid point, you must file that motion for reconsideration or you're going to lose that issue on appeal.

It simply can't be the rule that whenever someone makes an appeal of that type from the magistrate to the judge, that automatically, as you are indicating under 602(c), that attorneys fees have to be granted. That is an unreasonable burden. It is an unreasonable punishment to place on a litigant who is legitimately filing an appeal of a point from a magistrate to a district judge. That so chills the right to litigate a case it is unbelievable. If the litigants in cases cannot appeal a case from the magistrate to the district judge because they know that if they lose, if the judge decides that case--that point against them, they're going to have to pay attorneys fees, that simply

cannot be the rule, Judge. That is too punitive. That cannot be the rule.

I suggest to you if that is the rule in 602(c), 602(c) is unconstitutional. And, in fact, I believe that it is unconstitutional for other reasons also. 602(c), it doesn't set up any frivolousness standard. There is no standard at all under 602(c). So I believe that's the reason that the change was made in the new local rules; that automatic attorney fee provision I think any reasonable person knows in simply not legal. And I would simply ask that the Court not assess attorneys fees under that provision.

I would need to ask a factual question also. I didn't understand in your ruling who you were going to assess those attorneys fees and costs against. Is it the plaintiff or is it the plaintiff's attorney or which? Can I get a clarification on that?

THE COURT: I didn't make that clear. I don't think the record before me permits a determination as to whose relative responsibility this is.

MR. SMITH: I would suggest that that rule does not allow attorneys fees against the attorney.

THE COURT: Well, the rule doesn't say.

MR. SMITH: It mentions the word "party." But I would, if I could, like to get a clarification on that point.

THE COURT: Mr. Hedger, do you wish to be heard?

MR. HEDGER: If I may, Your Honor, very briefly.

I think this Court accurately observed earlier in these proceedings this morning that somehow very often Mr. Smith does not listen to either himself, opposing counsel or this Court. Had Mr. Smith taken the time to understand the questions that he was asking Mr. Eddins at the time that I objected, had taken the time to even have the court reporter perhaps read it to him over the telephone and/or even, critically important, gotten a copy of that portion of the transcript from the court reporter, he would have been in a position to evaluate the legal merit of the question posited to the witness, the objection ,the court ruling, and on ad nauseam. Not doing all that, he willy-nilly files motions for reconsideration without any reference to the record and without any reference to any controlling authority in support of his position. It's not--for the record, Your Honor.

THE COURT: Well, I will assess attorneys fees in the case either against the plaintiff or her attorney, depending on whose conduct caused the filing of the motion for reconsideration. That's what Tenth Circuit authority requires me to do, to assess, whether it was the

attorney's conduct or the plaintiff's conduct that caused the filing of the motion.

I note also that it seems to me if Rule--even if Rule 602 were constitutional, Rule 38(a)(4) provides ample authority for this Court to assess attorneys fees on a motion such as this. This was a discovery motion in front of the magistrate. The magistrate could have adjudicated the question of attorneys fees, and a motion for reconsideration is simply a further extension of that discovery dispute, and I don't have any doubt that if somehow there is some infirmity in Local Rule 602, which I don't think there is, Rule 37 provides an ample basis for this.

So next Thursday at the same time, Mr. Smith, you will be prepared to address the question of whether--of whose conduct necessitated or caused the filing of the motion for reconsideration. If it was your decision as a matter of attorney strategy that Ms. Dunkin didn't participate in and didn't approve, then you're going to pay it. If Ms. Dunkin approved it and participated in it, then she will pay them.

Do you understand the issue that I wish to have you focus on and address next Thursday morning?

MR. SMITH: I understand what you're saying, Judge. I don't know that it is appropriate for an attorney--for you to be asking the

attorney of the client to tell you who is responsible. I think that the conduct is on the record. What kind of submission are you asking me to make? An oral argument or a factual admission? What are you asking for in that respect?

THE COURT: I'm asking for some evidence concerning whose conduct caused the motion to be filed.

MR. SMITH: Well, I'm not sure that I understand what you're asking for then.

THE COURT: Well, either you or Ms. Dunkin can make representations to the Court concerning whose conduct is at issue here.

MR. SMITH: I think that the conduct is on the record, Judge. I don't know that it can be separated in that way.

THE COURT: Well, as far as I can tell on the record, it was you who signed the pleading. Is that what you're suggesting?

MR. SMITH: I signed the pleading, yes, Your Honor.

THE COURT: Well, Rule 37 and the Tenth Circuit authority that I'm thinking of, although I don't recall the case, permit the award of fees against the party or against the attorney. And I can't tell, based on this record, whose conduct necessitated the filing here. I notice that you are the one who filed it, but whether you were acting with the

approval of your client or not, I cannot tell. Do you wish to make any further record on that?

MR. SMITH: No, Your Honor. I'm just simply asking who the attorneys fees are being assessed against.

THE COURT: Is it your position that the present record is accurate to permit me to make that determination?

MR. SMITH: Yes, Your Honor.

THE COURT: And your position is that the fees ought to be assessed against who, you or Ms. Dunkin?

MR. SMITH: Your Honor, I don't take a position on that. I don't believe that the fees are assessable in the first place. I was simply asking for a matter of clarification as to who the order ran against.

THE COURT: Well, you say the present record is clear. What's it clear about?

MR. SMITH: I think the present record is clear on the conduct that you are asking me about. As you mentioned, I filed the pleading. Judge, I really don't think it's appropriate for me to be making some kind of representation to the Court as to who should have the blame for doing something that I don't even believe is blamable.

THE COURT: All right, I'm prepared to rule on this. This is not a case where Ms. Dunkin has hidden documents from her attorney

or failed to make discovery or failed to cooperate with her attorney. It's a case where her attorney has filed a pleading with this Court which the Court has found to be frivolous and which is sanctionable under Rule 37. So, Mr. Smith, you will pay the attorneys fees, the costs and the costs of the transcript.

MR. SMITH: Thank you, Your Honor. Is there any date by which I have pay that?

THE COURT: Well, we need to get a determination of the amount, I believe. So, Mr. Hedger, you will next week file your documentation supporting your request for fees and so forth, and I'll make the same order I did on the previous order for attorneys fees. It will be paid within a certain date. We're not going to let this drag out till the end of the case and be swallowed and lost as the case progresses. So the first step in this will be that Mr. Smith, by next Tuesday, will submit documentation. By next Tuesday, I mean December 8th. I said Mr. Smith; I meant Mr. Hedger.

I am going to grant the motion for extension of time to respond to subpoena filed by INA because I take it that INA has been placed in the position by the plaintiff's proposed instructions where it hasn't been able to produce the documents on a timely basis.

Does anybody dispute the representations of INA?

MR. HEDGER: No, Your Honor.

THE COURT: All right.

MR. SMITH: Yes, Your Honor, I dispute the representations that they have been placed in a position of not--of course, I'm not dealing with the insurance company directly; I'm dealing with the defendants. I really don't--I don't know what INA is doing. My document request goes to the defendants and those document requests have been outstanding since last April.

THE COURT: All right, the motion for extension of time to respond to the subpoena is granted, good cause having been shown for that.

The final matter that I can resolve this morning is the matter raised by plaintiff's response to attorney-client privileged correspondence. Although that's styled a response, there is a request at the end of the response asking me to require that the defendants produce those materials.

Upon review of the materials, I find that the information in there isn't quite sufficient to satisfy the defendant's burden of demonstrating that this material is protected by the attorney-client privilege.

In most cases, this is perfectly adequate, and in my experience as a lawyer and as a judge, usually the parties agree that correspondence from an attorney to a client during the course of litigation is not something that either one of them wish to pursue. However, technically I believe that the privilege logs do not satisfy each of the elements of the attorney-client privilege, namely that there be a communication to or from her attorney, to or from a client for the purpose of obtaining legal advice or giving legal advice, and the privilege hasn't been waived by disclosure.

So what I think needs to be done to make the record, Mr. Hedger, is that somebody needs to review all of this correspondence and in some sort of sworn representation under oath to the Court represent that each of these documents either discusses litigation strategy or somehow is communication by an attorney to a client or from a client to an attorney seeking or giving legal advice. And I thought about concluding that the fact that somebody at Louisiana-Pacific sends a letter during the course of this litigation is sufficient evidence, but it really isn't because the letter I suppose could concern your going fishing up in Idaho. There has to be a showing that it concerned legal advice in some way, and it ought to be a sworn showing. So I'll require Louisiana-Pacific to do that.

I'm not ruling this morning on plaintiff's request that this material be disclosed because I think that you ought to be entitled to make a record that what apparently is privileged is truly privileged, and you ought to be entitled to make that by way of affidavit.

MR. SMITH: Your Honor, even though you're not ruling on that this morning, I am confused as to the procedure that we're following here. I thought originally there was going to be an in camera inspection--

THE COURT: You know, Mr. Smith, this is just one more demonstration that you do not listen. I don't know how many times in this proceeding I have said that an in camera inspection, while it is occasionally undertaken as an expedient by some courts, makes no sense in the context of attorney-client privilege. The attorney-client privilege is a privilege to withhold information or not to disclose information to opposing attorneys, to juries, to judges and to anybody in the world, and it's not solved by a court saying well, I'll tell you what, I'll take a look at those in camera. I mean, suppose there's frank discussion in there from the attorney to the client about the nature of the judge. I don't think Louisiana-Pacific would want to disclose that, nor would be required to disclose that.

MR. SMITH: Your Honor, I'm not questioning your decision not to have an in camera inspection. It was just that originally, the representation was made by opposing counsel in this court that he was going to turn over the documentation to you for an in camera inspection. Sometime later, I found out what your position on that issue is, which is that you're not going to conduct in camera inspections.

Now the question I'm asking is what procedure are we following in order to get these documents turned over if that is necessary?

THE COURT: We're following the procedure that's contemplated by the federal rules. The defendant doesn't have to make discovery of privileged documents. That's clear under Rule 26. I think it's also clear, as I recall under the cases, that the burden of proving privilege is with the defendant.

I have just found that the material that the defendant has submitted so far does not technically carry that burden. I have given the defendant an opportunity to submit an affidavit, which will be done no later that December 14th, which will be a further attempt to establish--to carry its burden of proving that the documents should not be disclosed. That's the procedure.

MR. SMITH: And you will make a ruling then without further objection by plaintiff; is that correct?

THE COURT: Well, I don't know. When Mr. Hedger submits that, I assume that you will have something to say about it and you will be given an opportunity to have something to say about it.

Now, as I recall, I had directed the parties to get a pretrial order together; right? The jury room is open and available.

MR. SMITH: May I make--I have been ordered by Judge Abram for a hearing at 7:30. May I be excused to attend that hearing?

MR. HEDGER: Your Honor, may I make a suggestion?

THE COURT: Mr. Hedger?

MR. HEDGER: I have no objection to that. I would request perhaps an opportunity tomorrow to invite Mr. Smith over to my office with the court reporter if we are able to do that. My law partners are having a retreat today a little bit later on and I have been committed to do a presentation at a labor law lecture here shortly.

MR. SMITH: Your Honor, I'm in deposition today and tomorrow.

MR. HEDGER: Monday then.

THE COURT: Well, that's why we have these 6 o'clock hearings is to avoid these little squabbles, I'm in deposition, well, I

can't do it this day, I can't do it this day. Do it right now. Do it right now. You had this prior commitment, you knew you were going to be here till 8 o'clock, you could have gotten Magistrate Judge Abram's matter continued, Mr. Smith. That's your problem. Get back to the jury room.

MR. HEDGER: Thank you, Your Honor.

(7:20 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is correct transcript from the record of proceedings in the above-entitled matter.

January 3, 1993

Federal Reporting Service, Inc.
17454 E. Asbury Place
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(303) 751-2777

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LOUISIANA-PACIFIC CORPORATION,	)	92 N 243
	)	
Defendant.	)	

HEARING - DISCOVERY DISPUTES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 7:10 a.m. on the 10th day of December, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendant:

Cecil Raymond Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

PROCEEDINGS

(At 7:10 a.m. on December 10, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, with Mr. David Smith appearing as counsel for the plaintiff and Mr. Cecil Hedger appearing as counsel for the defendant, the following proceedings were had:)

THE COURT: Dunkin versus Louisiana-Pacific, 92 N 243. The matter is before the Court on all pending motions this morning. I'm still not sure that I can rule on some of these older motions. by [sic] that I simply mean that motions that have been filed early last month. There is a motion to require plaintiff to pay reasonable costs and expenses incurred by Insurance Company of North America in connection with those documents.

Where are we on the production of those documents, Mr. Hedger? I know INA has received a postponement of time.

MR. HEDGER: Your Honor, I have had a communication--a telephone conversation with counsel with Hall and Evans this week who has indicated to me that a substantial number of those documents are

being Bates stamped and will be forwarded any day. I would be surprised if it's not done by tomorrow.

THE COURT: So this motion will probably be ripe by next Thursday? I'm referring to the motion to require the plaintiff to pay some of the costs, and I'm also assuming that we've gone through the process of having the plaintiff narrow the documents that she wants to have. Wasn't that part of the process?

MR. HEDGER: that [sic] was part of the process, and I'm not sure if those documents were ever narrowed other than what plaintiff's counsel had articulated in a pleading in this court with instructions to the insurance company.

THE COURT: All right. Well, I thought that at the last hearing, I granted the motion for extension of time to respond to the subpoena.

MR. HEDGER: That is correct, Your Honor.

THE COURT: Well, it would appear to me then this motion is not yet ripe for determination at this time. And also there's the issue of the privileged log that you have till December 14th to produce more information, as I recall.

MR. HEDGER: That is correct, Your Honor. May I inquire of the Court as to whether or not that affidavit that was suggested by

this Court is required by outside counsel, or whether Mr. Kelso and myself may submit our own affidavit, Your Honor.

THE COURT: All I'm requiring is that it be a proper affidavit, that it be based on personal knowledge and not hearsay, and that it establish the basis for your knowledge. And I assume that you both have personal knowledge of your bills.

MR. HEDGER: Thank you, Your Honor.

If it would please the Court, with respect to that particular motion on the Insurance Company of North America, during proceedings in this court on November the 19th, 1992, this Court indicated that the plaintiff was to pay the reasonable costs and expenses incurred by the Insurance Company of North America--excuse me--plaintiff was required to pay one-half of the costs of the Insurance Company of North America, and the Insurance Company of North America would be required to pay the other half. You specifically disallowed the requirement that Hall and Evans' fees be paid.

THE COURT: Right. Yes, I'm looking right at that.

Then the only pending motion I believe--well, let me back up one step. There was a motion for sanctions that was filed by the defendant on December 11th, which I thought related entirely to the issue before the magistrate, that is to say that Mr. Smith responded to

the magistrate's order that he specify documents by--specifying additional documents and you moved for sanctions.

Did the magistrate rule on that?

MR. HEDGER: Your Honor, the basis of that motion for sanctions was the revelation in this court that plaintiff's counsel did not need those depositions, and yet we were being forced to respond in and before the magistrate concerning the third submitted deposition plan and the fact that the third submitted deposition plan had not yet met any of the prior court orders concerning this Court's order of July 16th concerning the special order of reference and further orders of Magistrate Borchers--Magistrate Judge Borchers as we've pursued it.

He did not--yesterday before Judge Borchers, Judge Borchers, at a colloquy between the court and plaintiff's counsel, where plaintiff's counsel again articulated he did not need the depositions for trial, only to defend a motion for summary judgment, Judge Borchers then articulated the fact that a pretrial order is due today in this court this morning and that we're on the calendar call tomorrow morning to have a trial date established, indicating that a quick trial date would probably be entered, or an early trial date would probably be entered, and did not then take up any of the plaintiff's deposition plan.

THE COURT: Well, the one sort of loose end is whether the defendant intends to file any motion for summary judgment. At the last hearing, I said I could never be in the position of preventing you from filing a motion that you thought was a good motion if that was the tactic you chose to use.

For some reason which still bewilders me, it is plaintiff's position that plaintiff needs the discovery to respond to a summary judgment motion but does not need the discovery for trial.

MR. HEDGER: I mean, both basically a directed verdict and--

THE COURT: But let's overlook that a minute. Let me ask you the question of whether, after consulting with your client, you've decided you want to file a motion for summary judgment or try the case.

MR. HEDGER: The client has indicated its desire and their desire as individuals to try and get this out on a legitimate motion for summary judgment based upon the issues that we would present and argue to the Court.

THE COURT: All right. That being the case then, we're back in the pickle where for some reason the plaintiff is saying that he needs the discovery to respond to the motion. You can be seated, Mr. Hedger. Maybe, Mr. Smith, you can run this one by me again.

I'm just--to me, there's sort of a contradiction, in fact not sort of a contradiction, there's a blatant contradiction between taking the position that you don't need the discovery to prepare for trial, but you do need it to respond to a motion for summary judgment. So--

MR. SMITH: Well, Your Honor, just to make sure that we're both talking about the same thing, when we're speaking of the discovery, as I told the magistrate in the hearing yesterday, the discovery that's being spoken of is the depositions only, because we need the documents both for the summary judgment motion and for the trial.

As far as the depositions are concerned, however, I do not think that it is absolutely essential to take further depositions other than the ones that are already in progress for any reason other than to defend the summary judgment motion. And I don't see any peculiarity in that position at all. I just don't--I don't think that the depositions are needed for the trial except for impeachment purposes. All of these witnesses that we would depose would appear at the trial and testify, but for purposes of the summary judgment motion, we would obviously need those depositions to defend that motion.

THE COURT: I know you've repeated it--

MR. SMITH: I don't know what you're--

THE COURT: --but I don't understand it. After all, a motion for summary judgment is a motion which suggests that the facts are not disputed and there is nothing to be tried. And if the motion is denied, then of course the case is tried, but the same facts are tried in the trial as are argued to be undisputed in the motion for summary judgment.

MR. SMITH: Your Honor, the Supreme Court and Tenth Circuit decisions that have come down in the area of summary judgment since 1986 have clearly indicated and stated that once that the defendants make some suggestion that a plaintiff cannot prove their case, then at that point, the plaintiff is required to produce all evidence on paper showing their entire case to the Court, or that case can be dismissed.

Under that kind of ruling, I think that the plaintiff has an obligation and in fact I think it would be malpractice not to take all the depositions of all the witnesses in the case so that the entire case can be presented to the Court on paper, as seems to be required by these decisions in the appellate and Supreme Court. And I think that's the clear ruling, the clear indication. I simply cannot proceed in the face of a represented motion for summary judgment by the defendants and tell you that I do not need the depositions. I do need the depositions if a motion for summary judgment is going to be granted. And knowing Mr. Hedger with all the paper that has been filed in this case, I can't

help but believe this will be a far ranging, kitchen sink motion for summary judgment which will require every piece of paper in the documents that have been produced and every depositions to be submitted to the Court in connection with the summary judgment motion.

THE COURT: Well, the summary judgment motion will, I assume, suggest that you have failed to make out a prima facie case, as the Supreme Court has defined that case in McDonald and its progeny. And if you don't have it for summary judgment, how are you going to get it for trial? In other words, if--

MR. SMITH: I will ask the witness to testify at trial, and that will provide the evidence--

THE COURT: So I see what you're saying. You're saying that what you'll be able to do at trial is--you won't need the deposition plan, you'll just call all those witnesses at trial.

MR. SMITH: Yes, Your Honor.

THE COURT: Wrong. That's wrong. I think you must know, Mr. Smith, that the range of testimony at trial is far narrower than the range of testimony at a deposition, and I do see what your thinking is now.

MR. SMITH: Well--

THE COURT: It had not--that line of reasoning had not occurred to me before this moment, and you are most assuredly told that you will not call 91 witnesses for trial of this case, or even 40 witnesses for trial of this simple little Title 7 case.

MR. SMITH: At this point, Your Honor, I think that our discussion two weeks ago becomes more clear, in that I qualified my statement that I did not need the depositions by stating that I only did not need the depositions if Mr. Hedger and the defendants were not going to file their motion for summary judgment. There has now been a clear representation by opposing counsel that they are filing a motion for summary judgment.

We are at the point right now where my motion asking the magistrate to authorize the depositions has still not been ruled on by the magistrate.

THE COURT: All right. I'm going to reverse the magistrate's order and reconsider it sua sponte. I think it's just a misreading of what I've said. I have not withdrawn anything from the magistrate. The magistrate is to review this and rule on it, and since--

MR. SMITH: The simple--

THE COURT: And, you know, I now begin to understand your strategy, Mr. Smith. This isn't your tactical opportunity to get an early

trial and then say this is the day we're aiming for. This Court's practice in case after case, and I am not singling out this case for any special treatment one way or the other, is that I do not set trials--set cases for trial until discovery is concluded.

Now, you can't possibly complete the discovery that you now are in effect saying you want, having heard that they are going to file a motion for summary judgment, by the discovery deadline, can you?

MR. SMITH: Excuse me, I didn't--

THE COURT: You can't possibly complete your discovery by the discovery deadline.

MR. SMITH: Absolutely not, Your Honor, and I said that to the magistrate yesterday, and he said, well, he didn't understand the rulings either, but that he would ask that the Court clarify this matter and he asked counsel to bring this up to the Court this morning for that reason, because I think it is apparent that these depositions cannot be completed by the discovery cutoff date, which is currently set at December 18th, for the reason we can't do the depositions, plus of course we don't have the documents yet either, we, meaning the plaintiff.

And so on both parts, both broad areas of discovery that are being pursued in this case, we simply don't have the information and will not have the information by the discovery cutoff date. And, yes, since a summary judgment motion is going to be filed, I am at this point forced to ask the Court for an extension of the discovery cutoff.

THE COURT: Well, you file your motion. File a motion. I'll consider it. But we're not going to extend discovery forever. I've done it once, I've done it--this is going to be the second time. I'll probably grant your motion, Mr. Smith, but it is utterly clear that the primary reason that you need these extensions of time is because you have fought the magistrate tooth and nail at every point in these proceedings. And so that's why you find yourself in a position where the magistrate has not ruled.

MR. SMITH: I'm not sure I understand the evidentiary basis for what you're referring to, Your Honor.

THE COURT: I'm referring to the entire record in this case, with which I am very familiar.

MR. SMITH: Well, I have filed--

THE COURT: And that is recited in my miscellaneous order Number 1.

MR. SMITH: I have filed three deposition plans and have submitted documentation not required by the rules of civil procedure, and the magistrate has still not ruled on the deposition plans and I still don't have the documents, and that was the reason the first discovery cutoff date was slipped, because the defendants had not turned over the documents. I still don't have the documents; I still don't have the depositions.

THE COURT: Well, you're just repeating yourself, Mr. Smith. The record is made and the record will speak for itself.

The motion for sanctions filed on December 7th is denied. The motion for approval of attorneys fees and costs with affidavit is the matter now before the Court.

I hesitate to ask the question are there any objections to the amount of attorneys fees, $1,807.93.

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Do you have evidence to produce at the hearing, Mr. Hedger?

MR. HEDGER: Yes, Your Honor.

THE COURT: I suspected you did. Proceed.

MR. HEDGER: If it please the Court, defendants at this time would call Mr. Walter Siebert as a witness.

WALTER V. SIEBERT

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: Walter V. Siebert, S-i-e-b-e-r-t.

MR. HEDGER: Your Honor, for the record--excuse me--well, for the record, Mr. Siebert was a witness on behalf of an earlier fee application submitted by defendants in that earlier proceeding on July the 16th.

THE COURT: I recall.

MR. HEDGER: He was qualified as an expert--

THE COURT: I recall his qualifications from that time.

DIRECT EXAMINATION

BY MR. HEDGER:

Q Mr. Siebert, have you had an opportunity to examine any documents concerning the instant motion for approval of attorneys fees and costs with affidavit that's presently before this Court?

A Yes.

Q Would you describe what documents you've reviewed?

A I reviewed plaintiff's motion for reconsideration, I reviewed the response and I reviewed another document entitled Louisiana-Pacific Corporation's response to Plaintiff's Second Request for Production of Documents, and I also reviewed the defendant's motion for approval of attorneys fees and costs and the attached affidavit.

Q Did you examine at any time, Mr. Siebert, any time records or computer time records maintained and prepared by the law firm of Harding and Ogborn?

A Yes, I did. I reviewed the time records covering the time period set forth in the affidavit.

Q Based--did you have a conversation or conversations with me concerning some of the background and--background information which led to the filing of the response to plaintiff's motion for reconsideration?

A Yes, basically describing the history of that. I think most of it was set forth in the attachments to the response in opposition to plaintiff's motion for reconsideration.

Q Have you, as a result of your review of the documents and your conversations with me, had an opportunity to form an opinion as to the reasonableness of the time that was expended in defendant's response to that motion for reconsideration?

A Yes, I have.

Q And what is that opinion?

A It would be my opinion that both the hourly rate, which I believe the Court previously found to be reasonable, and the hours expended and shown in the affidavit, Exhibit A, to be reasonable.

MR. HEDGER: May I approach, Your Honor?

THE COURT: Yes.

MR. HEDGER: With respect to an exhibit.

Q (by Mr. Hedger) Mr. Siebert, handing you a two page document that's been marked for identification as Defendant's Exhibit A, I ask that you examine that, and if you can, please identify it.

A Yes, this is a document I previously reviewed prior to the redacting of certain portions of that concerning the time expended on this case. It's my understanding that this is a form similar to what I've often seen before, and it's the time records, once they have been reduced to time written form, and the same is, in Exhibit A, would cover the time period--the first entry shown is 11-10 of '92, the last entry actually shown on Exhibit A is 11-19 of '92. And if I might say, the same applies--would apply to Exhibit B. It is the same type of document, merely covering a different time period, with the first entry being November 30, '92 and the last entry being 12-4 of '92.

MR. HEDGER: Your Honor, Exhibit A and B are copies of the computer runs that are maintained by Harding and Ogborn from my contemporaneous time records. If there's no objection to the introduction of those exhibits, I'll so move their introduction at this time. If there is an objection, then I'll have to become a witness again for all the authenticity and admissibility questions that we went through before.

THE COURT: Any objection, Mr. Smith?

MR. SMITH: Your Honor, I believe that I only have Exhibit A, and there's been reference made to an Exhibit B also.

MR. HEDGER: Excuse me. I inadvertently maybe failed to share it with counsel.

THE COURT: Go ahead.

MR. SMITH: I would like an opportunity to inquire of the witness before I make a judgment.

MR. HEDGER: I have no further questions at this time, Your Honor.

THE COURT: Mr. Smith, that examination took approximately seven minutes. Therefore, in all liberality, I'll give you ten minutes for your cross.

MR. SMITH: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Siebert, what is Exhibit A?

A Exhibit A is--my understanding of Exhibit A is that from Mr. Hedger's contemporaneous time records which he keeps, which is normal practice for most law offices, that is reduced to a time written form which is then submitted to the Accounting Department. This may be either what comes back from the Accounting Department or what went down to the Accounting Department, but it's reflective of the contemporaneous time entries which Mr. Hedger placed or kept during the time he performed the services reflected by these documents.

Q And by these documents, you mean Exhibit A?

A Exhibit A and B.

Q Is Exhibit A a contemporaneous time record?

A It is a reflection of a contemporaneous time record.

Q But I'm asking you whether it is a contemporaneous time record.

A I would consider it to be such. Yes, I would consider it to be such.

Q So these typewritten entries on Exhibit A were made up at or near the time that the time was actually expended to perform the duties shown on Exhibit A; is that correct?

A The entries were actually--the entries reflect the service actually performed on that particular date.

Q But I'm asking you if the entry was made at or near the time that the service was performed.

A Maybe I'm not understanding you. Do you mean, for example if we can look at Exhibit A on the first page, are you asking me whether this typing actually took place at or around the time that Mr. Hedger performed the service?

Q That's correct.

A No, the typing is reflective of the entry that Mr. Hedger made at that time.

Q Have you yourself reviewed any written records that Mr. Hedger made with respect to the entries shown on Exhibit A?

A No, I have not.

Q That was not given to you then as a part of what you reviewed before you came here today; is that correct?

A That is correct; that was not.

Q And does the same hold true for Exhibit B?

A Yes, it does.

Q Now, what is the difference between Exhibit A and Exhibit B?

A Period of time covered. These are both documents reflecting time expended on particular dates for matters concerned with this. The actual verbiage shown on the documents I think is the same--it's the same verbiage that is reflected in the attachment to Mr. Hedger's affidavit.

Q Based on the information in Exhibit A and Exhibit B, you have come to the conclusion that the time actually expended on the matters that are before the Court were reasonable periods of time; is that correct?

A That's correct.

Q How did you come to that conclusion?

A Based on my experience in terms of what time is necessary and reasonable to be expended in performing the various tasks set forth in the diary entries that Mr. Hedger has set forth in Exhibit A and B and which are reflected in his affidavit attachment.

Q How long did Mr. Hedge spend on the response to plaintiff's motion for reconsideration?

A Are you talking about the written response or are we talking the oral response--

Q Let's start with the written response.

A Approximately five and a half hours.

Q And in your opinion, that is reasonable?

A Yes.

Q What did the response that took five and a half hours, what did that consist of as far as a written response is concerned?

A It--my understanding is it consists of a document captioned or titled Defendant's Response in Opposition to Plaintiff's Motion for Reconsideration of Magistrate Judge Pringle's Granting of a Protective Order During Doug Eddins' Deposition on October 29, 1992, and Response in Opposition to Plaintiff's Motion for Reconsideration Filed With This Court on or about November 9, 1992 With Respect to Plaintiff's Third Attempt to Have This Court Order Defendants to Produce Documents Protected by the Attorney-Client Work Product Doctrine to the Plaintiff for Inspection and Copying.

Q And is it your testimony that that entire document took 5.5 hours?

THE COURT: Or just the title of the document took 5.5 hours.

THE WITNESS: Your Honor made a comment earlier about the number of trees. That may also be applicable here. I would say

that--my guess or my opinion would be that the preparation of the entirety of this document, including the review of the deposition, the--

Q (by Mr. Smith) No, I'm just asking you about the document now. I'm asking you whether it took 5.5 hours to prepare that document.

A I guess I was attempting to answer that. I apologize.

Q Go ahead.

A I think it would be my opinion that the document probably took longer than 5.5 hours--

Q No, I'm not asking you for your opinion there. I'm asking you based on the evidence that was presented to you by Mr. Hedger, how long did it take to prepare that document.

A I think I previously answered that based on the time records that he has submitted, 5.5 hours.

Q So it took 5.5 hours to prepare that entire document; is that correct?

A It took--yes.

Q Isn't it correct that that document includes a response that goes to a matter other than to the motion for reconsideration that plaintiff filed?

A It also includes some portion directed towards a motion--attorney-client or attorney work product privileges, yes.

MR. SMITH: Thank you. I have nothing further.

THE COURT: Mr. Hedger, any redirect?

MR. HEDGER: Just one or two questions, Your Honor.

REDIRECT EXAMINATION

BY MR. HEDGER:

Q Mr. Siebert, directing your attention to the first page of what has been marked for identification as Defendant's Exhibit B, further directing your attention to the date entry of November 30, 1992 with the initials CRH, do you see what I'm making reference to?

A Yes.

Q Did you have an occasion, Mr. Siebert, to see the unredacted portion of the first page of Exhibit B on the second portion of the time entry for 11-30-92 for myself?

A Yes.

Q Initials CRH?

A Yes.

Q And there was further time with respect to the November 30 time entries by myself, was there not?

A That's correct.

Q Both the exhibit to my affidavit that you reviewed, as well as the time entry on the first page of Exhibit B, Mr. Siebert, describe work other than the simple preparation of that motion--response to that motion for reconsideration, do they not?

A That's correct.

MR. HEDGER: No further questions, Your Honor.

THE COURT: Mr. Siebert, you may step down. Next witness, Mr. Hedger?

MR. HEDGER: Is there an objection to Exhibits A and B, Your Honor?

THE COURT: Yes, there was.

MR. SMITH: Yes.

CECIL R. HEDGER

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: Cecil R. Hedger, H-e-d-g-e-r.

Your Honor, with respect to first Exhibit A, Exhibit A is a photocopied portion of two pages of a client bill that was submitted to Louisiana-Pacific based upon my time records which I

contemporaneously maintain on a daily basis in a diary. It's submitted into word processing for input into the computer system, and it is input as a policy matter within the law firm of Harding and Ogborn on a daily basis.

Exhibit A, with respect to the time entry of 11-10-92 and 11-19-92 sets forth the entirety of the time that I recorded with respect to the Louisiana-Pacific - Geana Joy Dunkin engagement in the law firm of Harding and Ogborn. I did not, with respect to the request for approval of attorneys fees and costs, as wet forth in the exhibit to the affidavit, request all of the time for either November 10, nor November 19.

Exhibit A, with respect to the client statement that was submitted to Louisiana-Pacific on or about the first part of December is maintained and regularly kept in the normal course of Harding and Ogborn's business operations.

Exhibit B is a copy of what the computer has through that time, December the 4th, Your Honor, concerning time with respect to the motion for reconsideration and our response. Again, on the entry on Exhibit B, Page 1, 11-30-92, the time entry, 5.5 hours, was specifically listed that way for purposes of the potentiality of this hearing. There was other time spent and recorded and will be filled to

Louisiana-Pacific at an appropriate time at the conclusion of our billing cycle. Exhibit B has not been, as we speak, submitted to Louisiana-Pacific Corporation as a legal statement, but will be.

Exhibit B, again, is a copy of what will be a computer generated billing statement to the--to Louisiana-Pacific Corporation based upon contemporaneous time records that I have maintained in a diary, going through word processing into the computer system, and so it appears as it does on Exhibit B. Exhibit B, as well, is maintained in the normal and regular course of Harding and Ogborn's business operations.

THE COURT: Cross-examination, Mr. Smith? Five minutes.

MR. SMITH: No questions, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Mr. Smith, could you tell me why we needed to go through that? Just put that on the record, why we needed to have Mr. Hedger stand up, take an oath and testify concerning the same sort of document that he expressly identified in an earlier hearing in this matter.

MR. SMITH: I did not ask Mr. Hedger to do that, Your Honor.

THE COURT: Well, you objected to the documents.

MR. SMITH: Yes, I did.

THE COURT: Which means that that's the only way that he could get the documents in.

MR. SMITH: Well, I don't know--I have an objection to the documents, I don't think that anything that Mr. Hedger said about it sheds any light on the subject.

THE COURT: All right. Is there a motion to receive the documents?

MR. HEDGER: So moved, Your Honor.

THE COURT: Exhibits A and B--is there an objection, Mr. Smith?

MR. SMITH: Yes, Your Honor.

THE COURT: What's the basis for the objection?

MR. SMITH: I object on the ground that Exhibit A and B are not contemporaneous time records as required by the Tenth Circuit. Secondly, these documents were not submitted before today. If counsel wanted to submit those documents, he should have done it with his motion.

THE COURT: I find the objection frivolous. The exhibits are received.

(Defendant's Exhibits A and B were received in evidence.)

THE COURT: The Court finds that the firm of Harding and Ogborn has or will bill Louisiana-Pacific $1,807.93 in connection with the motion for reconsideration on which I had previously indicated that I would award attorneys fees.

I find, based on the testimony and all the evidence and the file, that the amount expended was in fact spent. I find that the amount of time expended was reasonable and necessary in the circumstances of this case.

Accordingly, Louisiana-Pacific is awarded attorneys fees on this matter of $1,807.93. And I should clarify it by saying that's attorneys fees plus the costs of ordering the transcript that the plaintiff should have ordered in the first place to perfect the record on appeal. That amount has previously, as I recall, been awarded against the plaintiff's attorney based on the previous record. And I gave the plaintiff full opportunity to indicate whether the amount should be awarded against plaintiff or her attorney, and based on the record, that's the best I can do. That amount will be paid by plaintiff's counsel no later than December 17th--I'm sorry--December 16, 1992.

MR. SMITH: Will the Court grant a stay of execution pending appeal?

THE COURT: No.

MR. SMITH: Your Honor, may I ask also the specific statutory or rule citation as the basis for the sanctions?

THE COURT: I've already explained that at the last hearing.

MR. SMITH: Maybe I don't have clarification on that. Was the basis Local Rule 602(c) or was the basis Rule 37?

THE COURT: That's been explained at the last hearing. Perhaps you should listen, Mr. Smith.

Court's in recess.

MR. HEDGER: Your Honor?

THE COURT: Yes, Mr. Hedger?

MR. HEDGER: Excuse me. I know we have been working--

THE COURT: On a pretrial order?

MR. HEDGER: --hard, until like 1 o'clock this morning, to finish and have prepared for this Court--

THE COURT: Very well, I'm sorry. I overlooked that.

MR. HEDGER: --the pretrial order. Your Honor, if I may make a suggestion?

THE COURT: All right.

MR. HEDGER: Yesterday at approximately 11:45 our time, I was in receipt of a fax description which identified for the first time

plaintiff's expert witnesses. If this Court is--and we are and have been in dialogue with Mr. Smith with respect to the need to depose those witnesses. We were informed that we would not be able to take those depositions next week because his experts are not prepared, and the discovery cutoff is December 18th. If this Court is going to entertain a motion that Mr. Smith has represented about extending the discovery cutoff, perhaps it is premature to deal with this at this time.

THE COURT: I'm afraid it is, Mr. Hedger. I thought I heard a representation that I understood before this hearing that the case was prepared for trial, for all practical purposes, and plaintiff was ready to go for trial.

MR. SMITH: That is--

THE COURT: I now see that the--I understand what Mr. Smith's strategy is, that strategy being that he simply intends to call all of these witnesses at trial, and if there's a motion for summary judgment, then he's claiming that he needs to have the witnesses' depositions. So we're right back to square one, in effect, and the magistrate has to decide whether these depositions are really needed for any purpose in this case, and the magistrate will do that.

I'm going to hand the final pretrial order back to you and suggest that you keep it in your drafts and extras folder, because I

don't see any use in us trying to do that now--trying to do a final pretrial order.

The calendar call on this case is vacated. I'm not going to set this case for trial. For one thing, if you're going to file a motion for summary judgment, I can't give you a quick trial date anyway because I have to consider the motion for summary judgment.

Court's in recess.

MR. HEDGER: Thank you, Your Honor.

(7:55 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

January 3, 1993

/s/ Mary C. Chevalier
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN, Plaintiff-Appellant, v. LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS, Defendants-Appellees, ---------- DAVID L. SMITH, Attorney-Appellant.	)	No. 92-1230
GEANA J. DUNKIN, Plaintiff-Appellant, v. LOUISIANA-PACIFIC CORPORATION [SIC], JAMES BELDIN, DOUGLAS EDDINS, Defendants-Appellees.	)	No. 92-1381

ORDER
Entered March 17, 1993

Before McKAY, Chief Judge, and LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing on banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

Patrick Fisher
Chief Deputy Clerk

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

Fed. R. App. P. 38

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

10 Cir. R. 46.5

The original of every motion, brief (printed or otherwise) and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the bar of this court, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. The signature constitutes a certificate that the signer has read the motion, brief, or other paper; that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. If a motion, brief, or other paper is not signed as required by this rule, it shall be refused filing unless it is signed promptly after the omission is called to the attention of the attorney or party. If a motion, brief, or other paper is signed in violation of this rule, the court, upon motion or sua sponte, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include dismissal or affirmance of the appeal, monetary sanctions, and initiation of disciplinary proceedings under the Plan for Attorney Disciplinary Enforcement, or an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, brief, or other paper, including a reasonable attorney fee.